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Legal Sidebar

Drilling Under New Wyoming Leases on Hold as Judge Requires BLM to Reconsider Impacts on Climate Change

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A recent decision in the United States District Court for the District of Columbia Circuit has paused oil and gas exploration and production activity in certain leased areas of Wyoming and hinted at heightened requirements that the Bureau of Land Management (BLM) must satisfy to comply with the National Environmental Policy Act (NEPA) before issuing oil and gas leases. Specifically, the decision will require BLM to conduct a more thorough review of the potential climate change impacts of certain oil and gas leases before allowing the lessees to conduct drilling operations.

The decision addresses five oil and gas lease sales for areas in Wyoming between May 2015 and August 2016 that resulted in BLM issuing 282 leases. BLM had determined that the lease sales did not require it to issue an Environmental Impact Statement (EIS), which is a detailed evaluation of a federal action that NEPA and its implementing regulations require for any federal action that will "significantly affect the quality of the human environment." Instead, BLM issued Environmental Assessments (EAs) that were "tiered to," *i.e.* incorporated, a resource management plan for the relevant area and an EIS, which BLM had produced at the land use planning stage. Addressing how the leases would impact climate change on a "conceptual level," the EAs acknowledged that oil and gas drilling on the parcels to be leased would cause Greenhouse Gas (GHG) emissions. However, BLM did not attempt to quantify and project the GHG emissions likely to result from the lease sales. The EAs noted that "[t]he inconsistency in results of scientific models … limits the ability to quantify potential future impacts at this level." The EAs concluded that the GHG emissions likely to result from each lease sale "would not have a measurable effect" when compared to national or global emissions, or would represent only an "incremental contribution" to regional and global GHG emissions. For each of the EAs, BLM issued a Finding of No Significant Impact (FONSI), meaning that BLM did not require an EIS to issue the leases.

Non-profit groups, including WildEarth Guardians, challenged BLM's issuance of these leases, arguing that "NEPA required BLM to conduct a more piercing consideration of the consequences of oil and gas drilling before it authorized the Wyoming Lease Sales." More specifically, Plaintiffs argue[d] that, by issuing the EAs and FONSIs in conjunction with the Wyoming Lease Sales, BLM violated NEPA because

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it failed to take a "hard look" at the GHG emissions and their impact on climate change. The court addressed a number of specific alleged shortcomings in the agency's efforts to consider the direct, indirect and cumulative impacts of the lease sales on GHG emissions as required by NEPA and its implementing regulations.

The court noted that once the leases were sold, BLM had made an "irrevocable commitment" to allow at least some GHG emissions, and therefore had to analyze the reasonably foreseeable impacts of those leases on GHG emissions. The court acknowledged that BLM was not required to assess or evaluate impacts on a parcel-by-parcel basis at the lease sale stage, and that a simple qualitative analysis of GHG emissions impacts in an EA is acceptable if more definitive information cannot be provided. However, the court found that "while BLM could not, at the leasing stage, reasonably foresee the environmental impacts of specific drilling projects, it could reasonably foresee and forecast the impacts of oil and gas drilling across the leased parcels as a whole." The court thus concluded that "given the mix of information available to BLM at the leasing stage, NEPA required that BLM reasonably quantify the GHG emissions resulting from oil and gas development on the leased parcels in the aggregate."

The court also found that BLM had "failed to sufficiently consider another potential effect of leasing: the downstream GHG emissions that would result from the production of oil and gas on the leased parcels." As the court noted, NEPA regulations require agencies to evaluate the indirect effects that are "caused by [a proposed federal] action and are later in time or farther removed in distance, but are still reasonably foreseeable," and the scope of this requirement has been a subject of considerable debate in recent years. After a lengthy review of existing precedent, the court found that "even under the heightened causation standard established" in previous cases, "downstream GHG emissions from fossil fuel use are an indirect effect of BLM's oil and gas leasing program at issue here" and therefore BLM was required to consider them in its NEPA review of the lease sales.

The court next considered the plaintiff's claim that BLM had not adequately addressed the *cumulative* impacts of the lease sales on GHG emissions as required by NEPA regulations. The court agreed with the plaintiffs, specifically noting that BLM's failure to quantify estimated GHG emissions undermined its conclusion that emissions resulting from the leases merely "represent an incremental contribution to the total regional and global GHG emissions levels." The court held that without quantified estimates, BLM "could not conceptualize the extent to which the lease sales would contribute to the local, regional and global climate change discussed in the EAs and tiered EISs." However the court disagreed with the plaintiffs' assertion that BLM should be required to employ a methodology that monetizes GHG emissions in the context of a "global carbon budget" in order to quantify the "social cost of carbon," finding that the agency's decision to forgo this analysis "does not rise to the level of a NEPA violation."

While this decision is important because of the court's determinations regarding the extent of agency obligations under NEPA to consider GHG emissions prior to lease sales, the court's choice of remedy is also noteworthy. The plaintiffs asked the court to void the Wyoming leases and enjoin BLM from authorizing leases until the agency complied with NEPA requirements per GHG emissions. However, while the court sided with the plaintiffs on the issue of BLM's NEPA obligations, it chose not to void the leases. Instead the court remanded the non-conforming EAs and FONSIs to BLM to allow the agency to address the deficiencies identified in the decision. The court noted that these deficiencies consist "merely of a failure to fully discuss the environmental effects of these lease sales" and that "nothing in the record indicates that on remand the agency will necessarily fail to justify its decisions to issue EAs and FONSIs." Noting, however, that the failures raised doubts about BLM's decision making regarding the Wyoming leases, the court enjoined BLM from issuing any permits to drill under the leases at issue in the case until BLM addresses its NEPA compliance shortcomings.

It is not yet known if BLM will successfully appeal this decision. If the decision stands, it has policy implications that may be of interest to Congress. By holding that NEPA requires BLM to quantify how its proposed leases impact GHG emissions, the decision hints that NEPA may require federal agencies to consider the impacts of a broader scope of federal actions on GHG emissions. Congress could amend NEPA to add specificity to its requirements, or look into NEPA compliance at BLM and other federal agencies.

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